No. 84-1531

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MICHIGAN,

Petitioner,

v.

ROBERT BERNARD JACKSON,

Respondent.

On Writ Of Certiorari To The Michigan Supreme Court

BRIEF FOR RESPONDENT

STATE APPELLATE DEFENDER OFFICE
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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Was Certiorari Improvidently Granted Because The Michigan Supreme Court's Judgment Reversing Respondent's Conviction Was Based On Adequate And Independent State Grounds, i.e., A Violation Of State Prompt Arraignment Statutes, Thus The Post-Arraignment Right To Counsel Issue Was Reached Only Because It Was Necessary For A Companion Case?

II. By Any Reasonable Standard, Can The State Establish That Mere *Miranda* Advice, Given Under The Coercive Circumstances Of This Case, Was Sufficient To Enable Respondent Jackson To Understandingly Waive His Rights To Counsel Guaranteed By The Fifth And Sixth Amendments To The United States Constitution?

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CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Amendments V and VI:

> "No person . . . shall be compelled in any criminal case to be a witness against himself. . ."
>
> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

COUNTER-STATEMENT OF CASE

During the early morning hours of July 12, 1979 Rothbe Elwood Perry was shot several times in his home in suburban Livonia, Michigan. Investigation at the scene showed that someone had entered the garage through an unlocked door and then pried open a door leading inside the house. On Saturday, July 28, 1979, following several weeks of investigation, Livonia police arrested the deceased's wife Mildred Perry, and Charles (Chare) Knight, a young black man from Detroit. (WHT 43-44).[1]

Ms. Perry promptly retained an attorney and was never successfully interrogated by police. (WHT 58). By Monday, July 30, 1979, Chare Knight, a young black man from Detroit, had confessed. Knight told police that he had been solicited by Ms. Perry to kill her husband. Knight, in turn, had contacted Respondent Robert Jackson. According to Knight, Jackson later told him that he and another man had broken into the Perry home and shot Mr. Perry. Following Knight's confession, Sgt. Ericson engaged police machinery to pick up Respondent Jackson. (WHT 45-49).

Detroit Police arrested Robert Jackson and a codefendant, Michael White, on the night of July 30, 1979. Interrogation

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[1] "WHT denotes Walker Hearing Transcript. Prior to trial, a *Walker* [374 Mich. 331 (1965)] hearing was held to test the admissibility of the statements made by Robert Jackson and his codefendant Michael White. This hearing lasted seven (7) days. The prosecution presented eight police witnesses and both defendants testified.

sessions began that night and were continued by the Livonia Police over the next three days. (WHT 49-50, 97, 448). During that time the police obtained seven statements from Jackson. All seven statements were introduced at trial. According to the prosecution witnesses at the Walker Hearing, events occurred according to the following outline:

Thursday, July 12, 1979

Rothbe Perry killed

Saturday, July 28, 1979

Knight confessed, naming Respondent Robert Jackson as principal

Jackson and Michael White arrested by Detroit Police

Tuesday, July 31, 1979

2:00 p.m. Jackson, White transported from Detroit Police Headquarters to Livonia Police Headquarters

3:30 p.m. Jackson statement I (oral) to Sgt. Ericson, Sgt. Garrison

5:52 p.m. Jackson statement II (tape) to Sgt. Ericson, Sgt. Garrison, Sgt. Hoff

6:30 p.m. Sgt. Ericson informs codefendant Knight of Jackson's statement

8:48 p.m. Jackson statement III (tape 2) to Sgt. Ericson, Sgt. Garrison, Sgt. Hoff

11:00 p.m. Sgt. Ericson informs Jackson and Knight of need to take a polygraph exam to determine "who was being truthful"

Wednesday, August 1, 1979

9:30 a.m. Sgt. Ericson begins work on warrant request

10:00 a.m. Jackson polygraph exam

10:30 a.m. Jackson statement IV (oral) to polygrapher

11:00 a.m. Jackson statement V (oral) to Sgt. Hoff

12:30 p.m. Jackson statement VI (written) to Sgt. Hoff

1:30 p.m. Interrogation of codefendant Michael White by Sgt. Hoff, Sgt. Garrison, Lt. Campbell; Jackson present for part

4:30 p.m. Arraignment, Arrest Warrant issued, 16th District Court, Jackson, Perry, White, Knight present and request counsel

Thursday, August 2, 1979

10:24 a.m. Jackson statement VII (tape 3) to Sgt. Hoff, Sgt. Garrison

Testimony of Police Regarding Tuesday, July 31, 1979

The interrogation sessions at the Livonia Police Station were conducted by Sergeant Richard Ericson, Sergeant Shirley Garrison, and Sergeant William Hoff. All were veteran officers with more than 20 years of police experience. Robert Jackson, a 26 year old black man, had dropped out of his Detroit high school in the 11th grade.

Sgt. Ericson was the first prosecution witness to describe the interrogation sessions. Sgt. Ericson and Sgt. Garrison first picked up Robert Jackson and Michael White at Detroit Police Headquarters. Sgt. Ericson assumed they had already been questioned by Detroit Police (WHT 97). He testified that he gave Miranda advice in the garage, (WHT 51-52), and proceeded directly to Livonia, but there was no questioning en route. (WHT 98). Sgt. Ericson suggested "that they not make any comment at this time." (WHT 140).

Jackson and White were next taken into the booking room of the Livonia Police Station. Chare Knight was in the booking room when they arrived. (WHT 143-144). White was left in the booking area and Jackson was taken to the "conference" room in the basement of the police station. (WHT 51).

According to Sgt. Ericson, the first Livonia interrogation of Jackson began at about 3:00 p.m. and ended at about 4:20 p.m. (WHT 99, 115). They did not use a tape recorder but instead took notes. (WHT 113-114). Both Sgt. Ericson and Sgt. Gar-

rison were present when Sgt. Ericson again recited Miranda advice. (WHT 53). Both officers then alternately "explained various aspects of the case in an effort to demonstrate to him why he was now incarcerated." (WHT 55). They told him that Chare Knight had confessed to shooting Mr. Perry and had implicated him. Sgt. Ericson did not consider this questioning, instead "we were telling him. . . what we felt the case was against him. (WHT 100). Sgt. Ericson testified that Jackson never asked if he would be given leniency or a break, and only after arraignment did he tell Jackson that he would present the case to the prosecutor for a decision with one option being second degree murder. (WHT 128-130).

Sgt. Garrison, however, testified that at the first interrogation session Jackson raised the issue of a deal so that he wouldn't go to jail. Garrison felt Jackson "wanted to plead to anything if he could get a break too." (WHT 234-237). According to Sgt. Garrison, after telling him the difference in penalty between First and Second Degree Murder, they also told Jackson:

> "Later on you may obtain an attorney and whatever the attorney and the prosecutor works out between each other, then it is not in our hands, we can do nothing more than the First Degree." (J.A. 107).[2]

By about 3:30 p.m. on the 31st, Robert Jackson began "giving" a statment. (WHT 100). In this first statement Jackson, in the manner of facts police suggested, stated that Knight was the shooter and admitted accompanying Knight to the Perry home. (WHT 55-57). However, the police knew that Knight had accused Jackson of the shooting and had denied being present when the shooting occurred. (WHT 45-47, 61). Knight also testified to this version at Jackson's preliminary examination.

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[2] "J.A." denotes Joint Appendix.

At 5:02 p.m. interrogation[3] resumed and Jackson signed a form waiving his rights under *Miranda*. (WHT 71). Sgt. Ericson testified that they began tape recording Jackson's second statement at 5:52 p.m. and finished at 6:27 p.m. (WHT 115-116). This first taped statement was "basically the same facts" given by Jackson in his first oral statement. (WHT 57-58).

Shortly after 6:30 p.m. on July 31, Sgt. Ericson confronted Chare Knight with Jackson's statement. Knight vehemently denied Jackson's version. (WHT 59). When the police later (8:48 p.m.—9:40 p.m.) returned to Jackson for a third (second tape recorded) statement, he gave "fundamentally the same" statement, again naming codefendant Knight as the shooter. (WHT 60). Then, at about 11 p.m. Sgt. Ericson "informed" both Jackson and Knight "that I was going to request that they submit to a polygraph examination . . . to assist me in determining who was being truthful." (WHT 62). Sgt. Ericson testified that he also told Jackson that he would be arraigned the next day and that afterwards the prosecutor and his court appointed attorney would "discuss the case". (J.A. 14).

Sgt. William Hoff testified that the Livonia Police had sufficient evidence to arrest Robert Jackson when they took custody of him from the Detroit Police on July 31st. Sgt. Hoff also testified that they "could have sought a warrant that [Tuesday] evening. However, . . . the Prosecutor's Office was closed." (J.A. 122-124). Hoff agreed that if the warrant had been issued on Wednesday morning, August 1st, Jackson could have been arraigned that morning, except the police needed to take him to a polygraph test. (J.A. 125).

Wednesday Morning, August 1, 1979

At about 9:30 a.m., Sgt. Ericson began work on the warrant request for Robert Jackson. (WHT 64-65). In the meantime,

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[3] Sgt. William Hoff testified that he had notes of conversations or interviews of Jackson at 4:45 p.m., 6:37 p.m., 7:45 p.m. and 8:01 p.m. on July 31st. These conversations were not tape recorded. (WHT 337).

from 9 a.m. until about 12:30 p.m., Sgt. Hoff accompanied Jackson to the State Police Post for a polygraph exam. (WHT 343-344). Lt. Chester Romatowski, the polygraph operator, testified that he first gave Miranda advice. (WHT 373). At the conclusion of the examination, when Lt. Romatowski told Jackson that he was lying, Jackson admitted that he was the shooter and that codefendent Michael White had accompanied him to the Perry home. Lt. Romatowski told Jackson he should tell this to the Livonia police. (WHT 376). By about noon that day, Jackson also confessed orally and in writing to Sgt. Hoff. (WHT 308-309).

Wednesday Afternoon, August 1, 1979

At about 1:50 p.m. Sgt. Hoff and Sgt. Garrison began an interrogation session with codefendant Michael White. (WHT 312). Robert Jackson was brought into the interrogation room to help convince White that he should "cooperate" by making a statement. (IT 21-26).[4] Nevertheless, White repeatedly denied any involvement and was returned to the lock-up at about 3:30 p.m. However, by 4:00 p.m. just as he was being sent to District Court for arraignment, White asked to see Sgt. Hoff and admitted that he had been with Jackson when the shooting occurred. (WHT 313-314).

Sgt. Hoff and Sgt. Garrison used a variety of techniques to convince White to tell them where the murder gun was. As the tape recording reveals, Sgt. Hoff was the calm, soft-spoken and reasonable interrogator while Sgt. Garrison was the tough-talking, impatient interrogator. As they had with Jackson, they began by repeatedly telling White the evidence they had against him. (J.A. 150-155). At the same time they offered a deal, the police repeatedly threatened White with first degree

[4] "IT" denotes Interrogation Transcript for the Wednesday afternoon session involving primarily codefendant Michael White. A portion of this transcript is included in the Joint Appendix, pp. 144-164.

murder, high bond and even tearing up his house.[5] (J.A. 149-153; IT 20-22, 30-32, 34-35). These police officers advised White that if he asked for an attorney he would go to trial on first degree murder just like Ms. Perry. (J.A. 157-163). According to the police:

> "GARRISON: Now I think you need a brick to hit you against a wall to realize that your in serious trouble here and that the only way that you have any hope is by us. I don't know what your gonna think, now if you want an attorney, I'll tell you what an attorney is gonna tell ya, an attorney is gonna tell ya don't talk to police. I can tell you that right now. Don't talk to the police. But, the attorney doesn't go to jail, does he?
>
> "HOFF: You know what the attorney does when you say that, the attorney knows that that's going to get a trial, even if he's appointed he gets paid by how much trial days." (J.A. 157-158).

[5] The police threats are too numerous to list completely, however, a few examples include:

> "You're involved in a murder . . . you're gonna be going to court. The only thing that remains is whether or not you decide to tell us about it, cooperate, see what kind of deal we can get worked out for you." (J.A. 153).
>
> * * *
>
> ". . . the bond will be so high that you won't be able to get out. It doesn't have to be . . . . The only thing we don't know . . . whether we're gonna let you plead to something less, or . . . nail you all the way up murder in first degree." (J.A. 156).
>
> * * *
>
> "If you continue this position, there's only one way we can deal with you and that's go to trial. We're not gonna say, hey, we'll give Michael White the same deal that we gave Jackson and Charley." (IT 19).
>
> * * *
>
> "If you want to go up on murder one, life imprisonment, that's up to you. Now we'll work a deal and plead to something less and get two years, get out, that's your business. It's your choice." (IT 20).
>
> * * *
>
> "That guy who just knocked on the door? You know where he's going right now? . . . He's got a search warrant. He's gonna tear [your] house apart." (IT 24).

The police also placed time pressure on White, saying among other things, "the train is pulling out [of] the station", and '[t]omorrow is gonna be too late." (J.A. 160-163; IT 12, 18). Other techniques included suggesting White's stomach would relax if he talked[6], (J.A. 154), and arguing that his parents, teachers, ministers and judges would want him to cooperate and tell the truth. (IT 13-14, 31).

During their interrogation of codefendant Michael White, Sgt. Hoff and Sgt. Garrison repeatedly stated that they had already made a "deal" with Robert Jackson.

> GARRISON: We have almost sixty witnesses right now who will be testifying. And one of those witnesses is going to Bobby [Jackson]." (J.A. 155)
>
> * * *
>
> "HOFF: . . . Charlie, he's cooperating, we're gonna let him off with somethin' easy. And even the guy that did the shooting, Bobby Jackson." (J.A. 160).
>
> * * *
>
> "GARRISON: Bobey is not gonna take this whole load himself. Murder on is a lifetime and he knows that. He threw the damn dice out there, he's gambling. Charlie's gambling, that the Prosecutor's office, because of their sincere and honest testimony, that they'll be given some kind of consideration.
>
> "HOFF: We've already worked with the Prosecutor on that and come up with a few things . . . we've made a few deals there . . . Bobby is not going to be going for Murder One . . ." (IT 13).
>
> * * *
>
> "HOFF: And the police are gonna continue to treat him [Jackson] fairly. He's gonna, he's already got himself . . . he's gonna be charged on murder one. Initially he'll be on the warrant but that's gonna be worked out.

[6] Both Sgt. Garrison and Sgt. Hoff acknowledged that White had complained of stomach pains the previous day. (WHT 238, 325).

> "GARRISON: At the proper time he gets an attorney, a deal will be made at that time for his testimony that he will be allowed to plea to murder two. Then what's gonna happen is that he'll plead to murder two, he won't be sentenced until after the trial, after your trial is over with, and Mrs. Millies' trial is over with. After he testifies, the truthful and honest testimony, then the judge will sentence him. . . .
>
> "HOFF: He's gonna plead to a lessor and not be sentenced until the whole thing is over." (IT 18).
>
> * * *
>
> "HOFF: All we need is the testimony of Charlie Knight and Jackson and we've got a super case against her [Ms. Perry]. We've got a case against them but they're gonna plead ahead of time. . . . If you continue this position, there's only one way we can deal with you and that's go to trial. We're not gonna say, hey, we'll give Michael White the same deal that we gave Jackson and Charley." (IT 19).

After interrogating White for nearly an hour, Sgt. Hoff and Sgt. Garrison brought Robert Jackson into the interrogation room to persuade White to talk. (IT 21). Sgt. Hoff and Sgt. Garrison continued to outline their negotiations with Jackson:

> GARRISON: [H]e [White] not only knows that you're [Jackson] gonna be testifying . . . ah, but the other man [Knight] is goin to be testifying, because how they'll do it, they'll take a plea of guilty probably to second degree murder and then just hold your sentencing up for honest testimony.
>
> "HOFF: . . . you're gonna do some time, but you can come out with a little bit of time, as opposed to 15, 20 or 25 years on a first degree . . . You know, this guy [Jackson] didn't come right in and spill the whole thing, . . .
>
> "GARRISON: No" (IT 22).
>
> * * *
>
> "HOFF: You don't have to say nothing. We don't need that right now. But I'm hoping you'll, you'll go along and play ball like he [Jackson] is, like Charlie is. . . .
>
> "WHITE: Play ball? What kind of ball?

"HOFF: Well, trying to work yourself a deal, because your. . . .

"WHITE: What's that.

"HOFF: A plea to second degree, and maybe somethin' even less. I can't say anything less but at least a plea to second degree. Maybe even less. That's up to the prosecutor. How much time. . . .

"JACKSON: (inaudible) And how cooperative, you know, that we be. . . .

"HOFF: How about. . . .

"JACKSON: That's to jam her, that's what they want, I keep telling you. . . .

"HOFF: For testimony, we need testimony to get her good.

"JACKSON: This is what they're getting as far as we're concerned." (IT 24-25).

At the *Walker* hearing Sgt. Hoff testified that he had no knowledge of anyone on July 31st mentioning the possibility of anything less than First Degree Murder for Jackson. (WHT 341). Hoff testified that when Jackson raised the issue of a reduced plea on the return trip following the polygraph examination on August 1st, Hoff told him "it was up to the prosecutor, but that if he testified truthfully, that there may be something that could be worked out for him." (WHT 342). Later, on redirect examination, the prosecutor asked Sgt. Hoff to explain his comments during the White interrogation about a deal with Jackson. Hoff admitted telling White something "might" be worked out as with Jackson and Knight, but added that he told White it would be up to the prosecutor. Hoff denied he ever indicated that he had any authority to set bond. (J.A. 131-135). Sgt Hoff also testified that everything said during the interrogation of Michael White was "basically" true. (J.A. 129-130).

Sgt. Garrison testified that "nothing was ever said about the cooperation. Right from the start we are unable to do anything." (J.A. 112). According to Garrison, Jackson and White were merely told about the penalty for First Degree Murder. (J.A. 113). Garrison specifically denied telling White that the police could help them if he cooperated. (J.A. 117-121).

According to the transcript of the tape recording of the interrogation of Michael White, the subject of how cooperation with the police could help an accused was discussed many times:

"HOFF: I'll tell ya, the only thing we don't know what we're gonna do. We know that we're going to charge you with murder one. We know that your gonna get arraigned today. We know that the bond will probably be so high that you won't be able to get out. It doesn't have to be, but it's gonna be high. The only thing we don't know at this point is how we're gonna treat you in a couple of weeks down the line when we get down to the circuit court, whether we're gonna let you plead to something less, or whether we're gonna stick with our evidence and nail you all the way up murder in first degree." (J.A. 156).

* * *

"HOFF: You are a hardened criminal, if you're sittin' there denyin'. Listen, let's put yourself in the position of the judge, okay? Your a judge. You get a guy up before ya. . . . He's cooperative with the police he's straightened it out. Told his side of it. . . . The ones that get probation, or get the light sentences, are the ones that cooperate and show a little more. You know, after a man's found guilty or pleads guilty, there are a lot of things that happen after that. There's a lot of evaluations that are done, presentence evaluation reports. . . . Well, the police input into that report is very important. . . ., if the police can say something favorable about the guy, say, 'Hey, he did cooperate. . . .' When the judge reads that, it carries a lot of weight because policemen aren't noted for making favorable comments about too may people who are defendants . . ." (IT 14-15).

* * *

"HOFF: Let me tell you somethin' right now. You know, I can't go out on a limb and promise you somethin' that I

can't deliver. Do you understand that? The only one who can really promise you anything or can work somethin' out for you is the prosecutor. We've given you a little bit here. He can do more for you that we can. . . . All I can tell you is that I'll do everything I can to help you can out of this. . . . We'll do everything we can." (IT 27).

* * *

"HOFF: . . . everybody doesn't have to get the same sentence. You plead to the same thing he does. He can do more time than you. . . . They're gonna look at your, your background, remember I already told you about the evaluations? They're gonna look at that." (IT 29).

* * *

"GARRISON: . . . Now, I'll tell you what Charlie Knight, when he told us that he didn't go to the house. . . . We told him, hey second degree, blah, blah, blah just like we said here. But listen if we find out you're lying, the deal if off. The deal is off. O.K., that the same situation here with you." (IT 32).

* * *

"CAMPBELL: They [police] can say, $10,000 bond or no bond. They can say that. But they can't release you." (IT 39).

* * *

"CAMPBELL: Well, the prosecutor don't know but he [Sgt. Hoff] can promise you more than they can. O.K. In other words, here, when they go down for the warrant, they say to the prosecutor, 'this is want I want', O.K.? The prosecutor'd say, '- - - you! What are you going for Two on this guy for? We want one.' And they'll say, 'Hey, the man helpin' us, the man wasn't in the house.' Dig it? . . . He say, 'Well, that what you really want?' 'Yeah, that's what we want.' 'O.K., then your got it.' But if they walked in there and says, 'This guy here, this guy said this guy was here and we can't prove it one way or another. But, this man is going to testify that he was there. We can't prove one way, we can't even, he hasn't even said nothing'. Alls he's done is jammed us from the word go. And so I guess we're going to go One.' (IT 45-46)

At 4:30 p.m. Robert Jackson and codefendants White, Perry and Knight were arraigned at the 16th District Court in

Livonia. (J.A. 2-3). Mrs. Perry was represented by an attorney. (J.A. 3, 166). The magistrate read the charges and asked for a plea from the defendants. (J.A. 165-168). The magistrate gave no advice and simply recommended the appointment of counsel pursuant to Jackson's acknowledgment of his written affidavit requesting counsel. (J.A. 168).

The next morning, at 10:24 a.m., Thursday, August 2, 1979, Jackson made a tape recorded confession admitting that he shot Elwood Perry. (J.A. 31-79). Sgt. Hoff began this last session as follows:

"Q Alright now Robert over the last day and a half or so we've talked with you on prior occassions and we've advised you of your constitutional rights, is that correct?

"A Yes, it is.

"Q And at that time you indicated that you did understand your rights and you at that time elected to waive these rights and answer certain questions, is that correct?

"A Yes it is.

"Q Okay I'm going to once again go through your rights and ask if you do understand them now, I'll read them. You do have a right to remain silent, not make any statements or answers nor incriminate yourself in any manner whatsoever. Anything you say can and will be used against you in a court or courts of law for the offense of offenses concerning which any statement is made. Do you understand what I've read this far?

"A Yes I do.

"Q Okay continuing that you can hire a lawyer of your own choice to be present and advise you before and during any questioning and that if you are unable to hire a lawyer you can request and receive appointment of a lawyer by proper authority without cost or charge to you to be present and advise you before and during any questioning. Do you understand them thus far?

"A Yes I do.

"Q And second, or continuing that you can refuse to answer any questions or stop giving any statement any time you want to and that no law enforcement officer can prompt you as to what to say during this questioning nor write you a statement for you unless you choose for him to do so. Now do you understand these rights as I've read them?

"A Yes I do.

"Q Now Robert just for the record can you tell us a little about your educational background?

"A Sir I went to McKenzie High School in Detroit, I went to the 11th grade and I had some vocational training. I took a vocational course (inaudible) and basically that's

"Q Okay now you're aware of course that I'm a police officer and these officers are also police officers with the Livonia Police Department, is that right?

"A Yes sir.

"Q Now knowing and understanding your rights ah do you at this time wish to answer any questions that we might ask of you?

"A Yes I am." (J.A. 31-33).

Testimony of Robert Jackson

Respondent Robert Jackson also testified at the *Walker* hearing. Jackson stated that he was first arrested by Detroit Police on July 30th and questioned three or four times. (J.A. 96). The Livonia Police took him into custody at about 1:00 p.m. the next day. (WHT 439-440). According to Jackson, he was not advised of his constitutional rights until the first tape recorded statement was made. (J.A. 87-89).

Jackson testified that he did not answer the police questions right away. (J.A. 88). After the police had told him they had enought evidence to convict him on Murder One, they indicated that they really wanted Mrs. Perry. Jackson asked for an attorney, but Sgt. Ericson and Sgt. Garrison told him that an attorney could not help him at that time. They told him that if

he cooperated by going along with codefendant Knight he would be offered Second Degree Murder with consideration of something less. (J.A. 89-92).

Robert Jackson testified that the two police officers kept "questioning and badgering" him with words. Although he was not physically harmed, at one time while in the holding pen, Jackson heard someone hollering and screaming which caused him to fear that he would be beaten. (J.A. 92-93). Jackson testified that he made the first tape recorded statement because of the threats and promises of Sgt. Ericson and Sgt. Garrison. As before, they told him he was foolish not to cooperate in an effort to get Mrs. Perry. They also indicated that he could expect their help with the probation officer. (J.A. 97-98). Jackson did not ask for an attorney at this session because the usefulness of an attorney had been "explained away" by the police. (J.A. 101-102).

Robert Jackson's first contact with Sgt. Hoff was during the evening of July 31st when he was told that he had to take the polygraph if he was to get Second Degree with consideration of something lesser. (WHT 454-455). Sgt. Hoff repeated the discussion regarding his cooperation during their trip to the state police post the next morning. He stated that anything less than Second Degree would have to come from the prosecutor. (WHT 458). According to Jackson, even the prosecutor introduced himself just prior to arraignment and said he would be looking for Second Degree. (WHT 459-460).

Robert Jackson met Lt. Romatowski at the state police post on August 1st. (WHT 460). After the polygraph exam, Lt. Romatowski told him he had failed. Lt. Romatowski also told him "it is a shame, Mr. Jackson. . . by refusing. . . to make a statement that you are really hurting your own chances for Second Degree Murder. . . because you are going to go up for life if you don't. (WHT 461). A few minutes later, Jackson met with Sgt. Hoff. Again, Sgt. Hoff mentioned the possible deal. Jackson then told him that he was the shooter. (WHT 463).

Jackson testified that the day after his arraignment he agreed to make a third taped statement, this time to confirm himself as the shooter. (WHT 465). According to Jackson he had wanted to describe the deal on tape, (J.A. 31), but police had told him "to keep it in a mild nature." (WHT 466-467).

Defense counsel asked that the challenged statements be excluded on grounds that they were obtained as a result of (1) promises of leniency, (2) psychological coercion, (3) delay in arraignment for purposes of interrogation, and (4) a denial of the right to counsel. (WHT 650-687). The trial judge, seriatim, ruled each of Robert Jackson's statements admissible. The trial judge stated that Jackson was advised of his Miranda rights before each statement and that the police had made no improper promises or threats. Further, the trial judge did not believe that Jackson had requested counsel nor did he believe that the statements were the result of any illegal delay in arraignment. (J.A. 15-24, 136-137). However, the judge suppressed codefendant White's statements. The trial judge found that White had made requests for counsel which were ignored and, in addition, the police had improperly offered plea bargains. (WHT 715-716).

All of Robert Jackson's statements were used at trial. Chare Knight also testified for the prosecution in return for a 10-15 year sentence for second degree murder. Jackson was convicted of second degree murder and conspiracy to commit second degree murder on February 4, 1980. He was sentenced to life in prison.

On appeal as of right, Robert Jackson asserted that he had been denied his rights to due process and to counsel, guaranteed under the State and Federal Constitutions. Mich Const. 1963, art. 1, §§ 17, 20; U.S. Const. Ams. V, VI, XIV. The Michigan Court of Appeals affirmed his conviction for second degree murder, *People* v. *Robert Jackson*, 114 Mich. App. 649; 319 N.W.2d 613 (1982). The Court of Appeals upheld the trial court's findings of fact and agreed that the prosecution "established a knowledgeable and voluntary waiver of defendant's right to counsel." 114 Mich. App., at 656. Relying on *Blasingame* v. *Estelle*, 604 F.2d 893 (CA 5, 1979), the Court decided that "the circumstances surrounding defendant's request for counsel show it to have been unrelated to the Fifth Amendment right to confer with or have counsel present before answering any questions." 114 Mich. App., at 659. The Court did not reach the Sixth Amendment question.

The Michigan Supreme Court granted discretionary leave to appeal, 417 Mich. 885; 330 N.W.2d 846 (1983), and reversed. 421 Mich. 39; 365 N.W.2d 56 (1984). The Court ruled that Jackson had not invoked his Fifth Amendment right to counsel. The Court ruled that Jackson's post-polygraph statements were inadmissible because they were obtained while police delayed arraignment for purposes of interrogation. 421 Mich., at 69-74. The Court also ruled that the post-arraignment statement was inadmissible because Jackson was denied his right to counsel. The Court's basis for this ruling was summarized as follows:

> "We have merely extended the *Edwards/Paintman* rule *by analogy* to cases involving requests for counsel during arraignment, on the basis of our interpretation of both the Sixth Amendment right to counsel and its state constitutional counterpart embodied in Const. 1963, art. 1, § 20." 421 Mich., at 68.

SUMMARY OF ARGUMENT

I. Certiorari was improvidently granted because the Michigan Supreme Court reversed Respondent Jackson's conviction on adequate and independent state grounds. Specifically, that Court found that the police had unlawfully delayed Respondent's arraignment in violation of State statutes and the State Constitution.

II. Police interrogation is a critical stage of all criminal proceedings. Fairness demands that there be some time in the proceedings when counselless police interrogation ends. The rule advocated by the State allows for the possibility of police badgering at any time. Compare, *People* v. *Gonyea*, 421 Mich.

462; 365 N.W.2d 136 (1984) [police questioning in absence of counsel immediately after sentencing]. Arraignment is well-recognized as the formal initiation of adversary proceedings. The right to counsel is indispensable to the fair administration of our adversary system of criminal justice and formally attaches at arraignment. *Brewer* v. *Williams*, 430 U.S. 387, 398; 97 S.Ct. 1232; 51 L.Ed.2d 424 (1977). Even well-meaning police seeking to interrogate an accused cannot be relied upon to adequately inform the accused of the value of counsel at post-arraignment interrogation. The record in Respondent Jackson's case clearly establishes that under any reasonable standard, Respondent did not make an understanding waiver of the right to counsel. Without the assistance of counsel or formal inquiry by a neutral magistrate, the likelihood of an understanding waiver of the right to counsel is remote. Therefore, an accused's request for counsel at arraignment is at least an ambiguous request for counsel at police interrogation. Logically, it is a request for assistance of counsel against the organized prosecutorial forces of the State in all forms and forums. Fairness and the efficient administration of justice would be promoted by a bright-line rule prohibiting counselless interrogation after arraignment unless counsel is waived pursuant to consultation with counsel or judicial inquiry similar to that required in *Faretta* v. *California*, 422 U.S. 806 (1975) and *Von Moltke* v. *Gillies*, 332 U.S. 708, 723-724 (1948).

ARGUMENT

I. CERTIORARI WAS IMPROVIDENTLY GRANTED BECAUSE THE MICHIGAN SUPREME COURT'S JUDGMENT REVERSING RESPONDENT'S CONVICTION WAS BASED ON ADEQUATE AND INDEPENDENT STATE GROUNDS, I.E., A VIOLATION OF STATE PROMPT ARRAIGNMENT STATUTES, THUS THE POST-ARRAIGNMENT RIGHT TO COUNSEL ISSUE WAS REACHED ONLY BECAUSE IT WAS NECESSARY FOR A COMPA ION CASE.

At the very outset of the majority opinion of the Michigan Supreme Court in Respondent Robert Jackson's case, Justice Cavanagh wrote:

> "The common issue presented in these appeals is whether statements obtained after a defendant has requested appointment of counsel at arraignment are admissible pursuant to the principles enunciated in *Edwards* v. *Arizona*, 451 U.S. 477; 101 S.Ct. 1880; 68 L.Ed.2d 378 (1981), and *People* v. *Paintman*, 412 Mich. 518; 315 N.W.2d 418 (1982), cert. denied 456 U.S. 995; 102 S.Ct. 2280; 73 L.Ed.2d 1292 (1982)." *People* v. *Bladel and Jackson*, 421 Mich. 39, 44; 365 N.W.2d 56 (1984).

Clearly the Michigan Supreme Court had granted discretionary leave to appeal in these companion[7] cases because they were interested in the very same issue the United States Supreme Court now wishes to consider. However, after first deciding this common issue, the Michigan Supreme Court went on to consider issues raised solely by Respondent Robert Jackson. One of these separate issues was decided in favor of Jackson purely as a matter of State law. Moreover, this issue was dispositive of the case on appeal, independent of the issue this Court now seeks to decide.

The Michigan Supreme Court ruled that the last four of seven statements obtained by police should not have been admitted into evidence in Respondent's state trial. The first three statements, in which Jackson admitted being present when Knight shot Mr. Perry, were obtained on July 31, 1979, the second day of Jackson's incarceration. The next three statements, in which Jackson admitted shooting Perry, were obtained on August 1st after Jackson had taken a polygraph exam. The last statement (Jackson as shooter) was obtained on August 2nd after Jackson's arraignment. It is apparent that all of the last four statements were obtained as a result of police tactics in delaying arraignment. In Part IV of their opinion, the Michigan Supreme Court relied exclusively on State law to suppress Respondent's post-polygraph statements. The Court stated:

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[7] The *Bladel* and *Jackson* cases are totally separate cases with nothing in common except a legal issue. The Bladel case arose from a transaction in Jackson County and the Jackson case originated in Wayne County.

"Although the police had sufficient probable cause to obtain a warrant for defendant Jackson's arrest as a result of codefendant Knight's statements, they did not do so. Defendant was 'arrested' on the murder charges on Tuesday, July 31, at 2 p.m. when he was turned over to the Livonia police. Since defendant was arrested for a felony without a warrant, the arresting officers were required to bring him before a magistrate for arraignment without unnecessary delay. MCL 764.13; MSA 28.871(1); MCL 764.26; MSA 28.885;[8] *People* v. *Mallory*, 421 Mich. 229, 238-239; 365 N.W.2d 673 (1984); *People* v. *White*[9], 392 Mich. 404, 424; 221 N.W.2d 357 (1974), *cert. den. sub. nom. Michigan* v. *White*, 420 U.S. 912; 95 S.Ct. 835; 42 L.Ed.2d 843 (1974)." 421 Mich., at 69.

* * *

[8] "A peace officer who has arrested a person for a felony offense without a warrant must without unnecessary delay, take the person arrested before the most convenient magistrate of the county in which the offense was committed, and must make before the magistrate a complaint, stating the offense for which the person was arrested." MCL 764.13; MSA 28.871(1).

"Every person charged with a felony shall, without unnecessary delay after his arrest, be taken before a magistrate or other judicial officer and, after being informed as to his rights, shall be given an opportunity publicly to make any statement and answer any questions regarding the charge that he may desire to answer." MCL 764.26; MSA 28.885.

[9] In 1960, based on State statutes, see fn. 8, and the State Constitutional guarantee of due process, then Mich. Const. 1908, art. 2, § 16; now Mich. Const. 1963, art. 1, § 17, Michigan became the first State to adopt an exclusionary principle similar to that announced in *McNabb* v. *United States*, 318 U.S. 332; 63 S.Ct. 608; 87 L.Ed. 819 (1942). *People* v. *Hamilton*, 359 Mich. 410, 411; 102 N.W.2d 738 (1960). Following the rationale of *McNabb*, the Michigan Supreme Court held inadmissible statements made during detention where arraignment had been delayed by police for the purpose of obtaining a confession. *People* v. *Hamilton*, *supra*. See also, *People* v. *Harper*, 365 Mich. 494, 502-503; 113 N.W.2d 808 (1962); *People* v. *Farmer*, 380 Mich. 198; 156 N.W.2d 504 (1968); *People* v. *White*, *supra*.

"The delay was used as a tool to extract the three post-polygraph statements. Sergeants Ericson, Hoff, and Garrison all testified that they asked defendant to submit to a polygraph so that they could determine whether he was telling the truth. Although they did not specifically instruct the examiner to obtain a statement, Sergeant Hoff testified that they had hoped to obtain another statement if defendant's original confession proved inaccurate. The police were obviously attempting to strengthen their case against all four defendants, particulary White, who had not yet confessed to any involvement. The three post-polygraph confessions therefore were not admissible." 421 Mich., at 73-74.

It is readily apparent that the Michigan Supreme Court's consideration of the post-arraignment *Edward's* type issue, see Parts I-III, was an *additional* ground which the Court needed to reach only for the companion case, *People* v. *Rudy Bladel*, Mich. S.Ct. No. 69749. All four of Respondent's post-polygraph confessions were obtained pursuant to an unreasonable delay in arraignment. It was during the unlawful delay that Respondent admitted he shot Mr. Perry. The final taped statement taken after arraignment merely confirmed what Jackson had already said during the unlawful delay. This is certainly fruit of the poisonous tree. *Wong Sun* v. *United States*, 371 U.S. 471; 83 S.Ct. 407; 9 L.Ed.2d 441 (1963). Moreover, it is difficult to imagine how the occurrence of an arraignment before the seventh and last confession would cure the unreasonable delay. In any case, if such arguments are to be made they must be on state grounds and in the state courts.

The Petitioner stated in the Petition for Writ of Certiorari:

"In their opinion, the Michigan Supreme Court held that the fourth, fifth, and sixth statements were obtained as a result of the violation of a state 'prompt-arraignment' statute. The Petitioner recognizes that this decision is not before this Honorable Court.

* * *

"*Even though a re-trial of this respondent must be held*, it is vital that this seventh statement be found to be admissi-

ble for the reason that in it, respondent admits that he was in fact the shooter, contrary to his earlier, admissible, statements. Thus, this petition presents a 'live' issue to this Honorable Court." (Petition for Writ, pp 12-13; emphasis added).

The record in Respondent's case includes more than 3800 pages of transcript. The hearing on Defendant's Motion to Suppress lasted seven (7) days and produced nearly 800 pages of transcript. It is incredulous that Petitioner now asks this Court to expend scarce federal judicial resources to review this case "even though a retrial of this respondent must be held". This Court should certainly find the *Bladel* case a more appropriate vehicle to resolve the issue of post-arraignment interogation.

This Court should dismiss the Writ of Certiorari as improvidently granted in Respondent Jackson's case because the decision of the Michigan Supreme Court to reverse his conviction was "alternatively based on bona fide separate, adequate, and independent grounds." *Michigan* v. *Long*, ____ U.S. ____; 103 S.Ct. 3469; 77 L.Ed.2d 1201, 1214 (1983). See also, *Lynch* v. *New York*, 293 U.S. 52; 55 S.Ct. 16; 79 L.Ed. 191 (1934); Seid, *Schizoid Federalism, Supreme Court Power and Inadequate Adequate State Ground Theory: Michigan* v. *Long*, 18 Creighton L.R. 1 (1984).

II. BY ANY REASONABLE STANDARD, THE STATE CANNOT ESTABLISH THAT MERE *MIRANDA* ADVICE, GIVEN UNDER THE COERCIVE CIRCUMSTANCES OF THIS CASE, WAS SUFFICIENT TO ENABLE RESPONDENT JACKSON TO UNDERSTANDINGLY WAIVE HIS RIGHTS TO COUNSEL GUARANTEED BY THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. Police Tactics In Robert Jackson's Case

Robert Jackson's case presents a unique and unusually candid inside view of police interrogation practices. In the 1960's,

the United States Supreme Court took the first serious steps to provide guidelines for police interrogation practices. *Escobedo* v. *Illinois*, 378 U.S. 478; 84 S.Ct. 1758; 12 L.Ed.2d 977 (1964), *Miranda* v. *Arizona*, 384 U.S. 436; 86 S.Ct. 1602; 16 L.Ed.2d 694 (1966). It is apparent that the police in Jackson's case found little pause in their efforts to circumvent the spirit of *Escobedo*, *Miranda*, and their progeny. Ordinarily these police practices remain undisclosed and only the barren waiver of rights and statements of the accused are highlighted. However, in this case, the police inexplicably made and retained a tape-recording of their contemporaneous interrogation of codefendant Michael White. A transcript of this tape-recording is a part of the record on appeal. In addition, there was an extensive record made at a seven (7) day pretrial suppression hearing.

Robert Jackson was first arrested by Detroit Police on Monday night, July 30, 1979, following the confession of Chare Knight accusing Jackson of the murder of Rothbe Elwood Perry. Knight's confession, and other evidence gathered by Livonia Police during nearly 3 weeks of investigation before Jackson's arrest, certainly provided sufficient evidence for "probable cause". Livonia Police had no lawful reason for not promptly taking Jackson before a magistrate.[10] (J.A. 122-123). Instead, they took him straight to their "conference" room in the basement of the police station. (WHT 50-51).

The police tactics in this case were designed to exert psychological pressure to obtain a confession to be used in court. First, Robert Jackson and codefendant Michael White were arrested, separated and incarcerated by Detroit Police. The next day (Tuesday) when transferred to Livonia, Jackson and White were told not to talk at all until they had arrived at the police station. (WHT 140). Presumably this prevented them from collaborating or, on the other hand, telling a story which they might feel compelled to stick to. By "chance" when they arrived at the booking area, there stood Chare Knight. (WHT

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[10] See fn. 9; *supra*.

143-144). Jackson was then isolated and still prevented from talking until police could tell him about the mandatory life imprisonment he faced and Knight's confession claiming that Jackson shot Mr. Perry. (WHT 54-55). A review of the taped interrogation of Michael White shows that the police repeatedly stressed the hopeless situation these defendant's were in. See fn. 5, supra.

The police also made it clear to Jackson that his only hope was to "cooperate", waive his rights and make a statement, so that he could plead guilty to second degree murder, and take whatever sentence break the police could persuade the judge to give. Respondent Jackson asserted that he had requested an attorney during the first interrogation session but was told that an attorney would not help him. (J.A. 89-92). Who could blame an accused for failing to understand the value of counsel after being given advice such as that given by Sgts. Garrison and Hoff:

> "GARRISON: Now I think you need a brick to hit you against a wall to realize that your in serious trouble here and that the only way you have hope is by us. I don't know what your gonna think, now if you want an attorney, I'll tell you what an attorney is gonna tell ya, an attorney is gonna tell ya don't talk to police. I can tell you that right now. Don't talk to the police. But, the attorney doesn't go to jail, does he?
>
> "HOFF: You know what the attorney does when you say that, the attorney knows that that's going to get a trial, even if he's appointed he gets paid by how much trial days." (J.A. 157-158).

The Livonia Police wanted the courts to believe that no promises or inducements were made to obtain Robert Jackson's waiver of rights and his statements because they did not "guarantee" a deal.[11] Essentially, this was their position according to

[11] Michigan Courts have long held statements inadmissible if induced by a law enforcement official's promise of leniency. *People* v. *Conte*, 421 Mich. 704; 365 N.W.2d 648 (1984); *Flagg* v. *People*, 40 Mich. 706 (1879). As discussed at length in *Bram* v. *United States*, 168 U.S. 532, 542-561; 18 S.Ct. 183; 42 L.Ed. 568 (1897), the reliability of such an induced statement is suspect. Modern day psychologists support this conclusion. Zimbardo P.G., The Psychology of Police Confessions. Psychology Today, 1967, June 1(2), 17-27.

their sworn testimony at the *Walker* hearing. (J.A. 105-108). Sgt. Garrison testified that "nothing was ever said about the cooperation. Right from the start we are unable to do anything." (J.A. 269). Yet, the transcript of the tape recording[12] of the interrogation of codefendant Michael White clearly reveals that the police induced Respondent Jackson to waive his rights under the Fifth and Sixth Amendments, inter alia, by persuading him that his "cooperation" would enable him to plead to a lesser offense and recieve consideration for his testimony at the time of sentencing. Even an experienced lawyer might have been persuaded that the Livonia Police truly controlled the Wayne Country criminal justice system. See e.g., Counter-Statement of Case, *supra*.

In trying to persuade White to "cooperate", the police repeatedly stated they had already made a deal with Jackson:

> "We have almost sixty witnesses right now who will be testifying. And one of those witnesses is going to be Bobby [Jackson]."
>
> * * *
>
> ". . . Charlie, he's cooperating, we're gonna let him off with something' easy. And even the guy that did the shooting, Bobby Jackson." (J.A. 160). See also, Counter-Statement of Case, *supra*.

Even while Jackson accompanied White and the police in the interrogation room, the police stated:

> ". . . you're [Jackson] gonna be testifying . . . ah, but the other man [Knight] is going to be testifying, because how

[12] At the *Walker* hearing, Sgt. Hoff testified that everything said at this interrogation session was "basically" true. (J.A. 129-130). Sgt. Garrison testified that he did not realize, at the time of this interrogation, that everything was being tape recorded. (WHT 276).

> they'll do it, they'll take a plea of guilty probably to second degree murder and then just hold your testimony or hold your sentencing up for honest testimony. . . .You know, this guy [Jackson] didn't come right in and spill the whole thing, . . ." (IT 22). See also, Counter-Statement of Case, *supra*.

When they later testified in court, the police were obviously taking a hyper-technical view of their negotiations with Jackson and White. The police were especially careful to couch their testimony at the *Walker* hearing in language designed to ensure admissibility rather than to reveal their actual interrogation practices. See fn. 11, *supra*. It is apparent that each defendant, when it came to critical moments in their interrogation (and even the trial court), did not understand the language game[13] being played by these veteran police officers. But, the tape recording is quite clear. The police, despite their protestations that no "guarantees" were made, threatened to nail Robert Jackson "all the way up on One" unless he cooperated by giving a statement "because how they'll do it, they'll take a plea to second degree murder and then just hold your. . . sentencing up for honest testimony." [Sgt. Garrison speaking to Robert Jackson (IT 22)].

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[13] In *United States* v. *Marshall*, 488 F.2d 1169, 1170-1171, fn. 1 (CA 9, 1973), the Court was concerned about the difficulty in understanding government agents:

> "The agents involved speak an almost impenetrable jargon. They do not get into their cars; they enter official government vehicles. They do not get out of or leave their cars, they exit them. They do not go somewhere; they proceed. They do not go to a particular place; they proceed to its vicinity. They do not watch or look; they surveille. They never see anything; they observe it. No one tells them anything; they are advised. A person does not tell them his name; he identifies himself. A person does not say something; he indicates. They do not listen to a telephone conversation; they monitor it. People telephoning to each other do not say 'hello;' they exchange greetings. An agent does not hand money to an informer to make a buy; he advances previously recorded official government funds. To an agent, a list of serial numbers does not list serial numbers, it depicts Federal Reserve Notes. An agent does not preface answers to simple and direct questions with 'to my knowledge.' They cannot describe a conversation by saying 'he said' and 'I said;' they speak in conclusions. Sometimes it takes the combined efforts of counsel and the judge to get them to state who said what. Under cross-examination, they seem unable to give a direct answer to a question; they either spout conclusions or do not understand. This often gives the prosecutor, under the guise of an objection, an opportunity to suggest an answer, which is then obligingly given."

Like Benjamin *[McNabb* v. *United States, supra]*, Robert Jackson made an incriminating oral statement after he was confronted with an accomplice's (Chare Knight) statement accusing him as the murderer. (J.A. 90-92). Although Jackson asserted that Knight was the shooter, his admission that he had accompanied Knight to the scene of the crime was surely enough to resolve any doubts, if there ever were any, about whether Jackson should be formally charged and arraigned. Nonetheless, the Livonia Police decided that more was required "to get the truth". Instead of taking Jackson before a magistrate, they held him to tape record his statement at 5:52 p.m. Then at 8:28 p.m., allegedly because the first recording was of "poor quality", the Livonia Police tape recorded the statement again. Each time Jackson asserted that Chare Knight was the shooter. (WHT 55-60).

Now with three confessions in hand, the Livonia Police still did not take Jackson before a magistrate. Instead, the next morning (Wednesday), like Andrew Mallory, [*Mallory* v. *United States*, 354 U.S. 499, 450-451 (1957)], the police had Jackson and Knight take polygraph tests. Sgt. Ericson testified that he told Jackson "he would have to submit to a polygraph test and pass it successfully before [he] totally believed his statement." (WHT 122). Presumably the winner of the polygraph sweepstakes would be given a "break" for cooperation in testifying against the loser. Chare Knight won. He subsequently testified against Jackson for a plea bargain to second degree murder and 10-15 years in prison. Robert Jackson lost. He subsequently admitted to the polygraph examiner and to Sgt. Hoff that he was the shooter. Finally, at 4:30 p.m., Wednesday, August 1, the Livonia Police finally took him

before a magistrate where he formally requested the assistance of counsel.

Extended incarceration was another tool the police used during their interrogation of Respondent Jackson. The length of delay Respondent's arraignment was not remarkable by itself. Jackson's first incriminating statement was made between 14 and 24 hours after his arrest by Detroit Police.[14] His last statement was made about 2-1/2 days after arrest. Benjamin McNabb's first incriminating statement was made just 5-6 hours after he was taken into custody. And Maurice Hamilton [*People* v. *Hamilton, supra*] lasted more than 3-1/2 days before he confessed. It was readily apparent, however, that the Livonia Police delayed arraignment for the unlawful purpose of extracting numerous incriminating statements to be used against Jackson at trial.[15]

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[14] There was no dispute that Jackson was first arrested by Detroit Police on Monday night, July 30, 1979. However, the record does not indicate the exact time of arrest on that date. Jackson testified that he was questioned 3 or 4 times by Detroit Police. (J.A. 96). Sgt. Ericson assumed he had been arrested and questioned by Detroit Police during the night of July 30. (WHT 97).

[15] Sgt. William Hoff testified at the *Walker* hearing that the Livonia Police had sufficient evidence to arrest Jackson when they took custody of him from the Detroit Police on July 31st. Sgt. Hoff also testified that they "could have sought a warrant that evening. However, . . . the Prosecutor's Office was closed." (J.A. 122-123). Hoff also agreed that if the warrant had been issued on the morning of August 1st, Jackson could have been arraigned then, except the police needed to take him to a polygraph test. (J.A. 124-125). Ironically, the police found time to take Jackson to a polygrapher but couldn't fit an arraignment into their busy interrogation schedule.

The suggestions by Livonia Police that the delay in arraignment was justified by their need for approval from the prosecutor and the typing of a 36 page affidavit in support of a request for a warrant were transparent cover-up arguments. In 1960, the Michigan Supreme Court in *People* v. *Hamilton*, 359 Mich. 410, 417; 102 N.W.2d 738 (1960), recognized that "[m]agistrates of Michigan are, for purposes

B. The Right To Counsel For In-Custody Police Interrogation.

It is difficult to overstate the importance of counsel for an accused in police custody and facing expert interrogators. This Court has recognized the powerful psychological tactics available to police interrogators. See *United States* v. *Henry*, 447 U.S. 264, 273-274; 100 S.Ct. 2183; 65 L.Ed.2d 115 (1980). In *Miranda* v. *Arizona*, *supra*, at 445-448, Chief Justice Warren prefaced that benchmark decision with a discussion of the coercive nature and setting of in-custody interrogation. In declaring that the presence of counsel was a matter of right, the Court stated:

> "The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the Interrogation is indispensable to the protection of the Fifth Amendment

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of said sections 13 and 26 [see fn. 8], on legal duty at all times; Sunday, holidays or no." In Wayne County there is an Assistant Prosecuting Attorney on call at all times. No one would doubt that, if police believed these procedures to be necessary to secure actual custody of Robert Jackson, they would have been streamlined to mere hours before he was taken into custody. But when custody had already been achieved and the accused's rights were at stake, police machinery moved at a decidely slower pace.

Due process does not define a strict number of hours within which prompt arraignment must occur. But the spirit of prompt arraignment is to avoid exactly what occurred here. Robert Jackson did not come to the police to volunteer a confession. He was arrested, jailed, pressured, wheedled and cajoled until he waived his rights to the satisfaction of the police and confessed numerous times. Others may have lasted longer but the timing of arraignment must not be dictated by the time it takes police to obtain a confession of their liking. This was not due process but police process. The Michigan Supreme Court recognized this and suppressed the statements obtained by the police after the polygraph exam. *People* v. *Bladel and Jackson*, 421 Mich., at 69-74.

privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation. A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights.

* * *

"The presence of counsel at the interrogation may serve several significant subsidiary functions as well. If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness. With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial." *Id.*, at 469-470.

In *United States* v. *Ash*, 413 U.S. 300; 306-313; 93 S.Ct. 2568; 37 L.Ed.2d 619 (1973), Justice Blackmun re-examined the history of the role of counsel in Anglo-American law.[16] Justice Blackmun was particularly concerned about the circumstances under which the right to counsel must be extended:

> ". . . extension of the right to counsel to events before trial has resulted from changing patterns of criminal procedure and investigation that have tended to generate pretrial events that might appropriately be considered to be parts of the trial itself. At these newly emerging and significant events, the accused was confronted, just as at trial, by the

[16] See also, *Powell* v. *Alabama*, 287 U.S. 45, 60-69; 53 S.Ct. 55; 77 L.Ed. 158 (1932); *Gideon* v. *Wainwright*, 372 U.S. 335; 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Massiah* v. *United States*, 377 U.S. 201; 84 S.Ct. 1199; 12 L.Ed.2d 246 (1964); *Coleman* v. *Alabama*, 399 U.S. 1; 90 S.Ct. 1999; 26 L.Ed.2d 387 (1970); *Brewer* v. *Williams*, 430 U.S. 387; 97 S.Ct. 1232; 51 L.Ed.2d 424 (1977); *Fare* v. *Michael C.*, 442 U.S. 707; 99 S.Ct. 2560; 61 L.Ed.2d 197 (1979); *Estelle* v. *Smith*, 451 U.S. 454; 101 S.Ct. 1866; 68 L.Ed.2d 359 (1981).

> precedural system, or by his expert adversary, or by both. In *Wade [United States* v, 388 U.S. 218; 87 S.Ct. 1926; 18 L.Ed.2d 1149 (1967)], the Court explained the process of expanding the counsel guarantee to these confrontations:
>
> > 'When the Bill of Rights was adopted, there were no organized police forces as we know them today. The accused confronted the prosecutor and the witnesses against him, and the evidence was marshalled, largely at the trial itself. In contrast, today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply 'critical' stages of the proceedings.' 38 U.S., at 224 (footnote omitted)." 413 U.S., at 310-311.

There should be little doubt that police interrogation is a more critical stage than the corporal line-up which was the subject of *Wade*. A confession not only establishes identity but also frequently determines every issue of a criminal trial. Although it is reasonable to assume that an accused will not often admit to some involvement in a crime when there was none, the determination of the accused's degree of involvement is often a more critical issue. It is here that the skills of counsel are required. Without counsel to insure accuracy, the jury trial frequently becomes a formality where the police redition of the accused's confession is practically unrebuttable.

Counsel is especially important when, as now, the criminal justice system is under extreme pressure. The caseloads of judges and prosecutors are increasing rapidly. These public servants, no matter how noble, are less able to perform their traditional and personal duties to insure that justice is done for each individual who stands accused. See *Burger* v. *United States*, 295 U.S. 78, 88; 55 S.Ct. 629; 79 L.Ed.2d 1314 (1935). In *Ash*, *supra*, at 308-309, the Court recognized the need for counsel to minimize the imbalance resulting from the creation of a professional prosecutor in the 18th century. As the criminal

justice system becomes increasingly adversarial, the individual must rely more heavily on defense counsel to insure fairness through a balance of power.[17]

It is well settled that each time the Livonia Police interrogated Respondent Robert Jackson while in custody, the 5th and 14th Amendments to the United States Constitutional guaranteed him the right to have counsel present.[18] Under some circumstances, a Sixth Amendment right to counsel has also been extended when, as in Respondent' case, police investigation has focused on the accused as a suspect rather than a

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[17] In *Brewer* v. *Williams*, *supra*, at 398, Justice Stewart wrote:

"This right [to counsel], guaranteed by the Sixth and Fourteenth Amendments, is indispensable to the fair administration of our adversary system of criminal justice. Its vital need at the pretrial stage has perhaps nowhere been more succinctly explained than in Mr. Justice Sutherland's memorable words for the Court 44 years ago in *Powell* v. *Alabama*, 287 U.S. 45, 57:

'[D]uring perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself.'"

[18] In *Edwards* v. *Arizona*, 451 U.S. 477, 481-482; 101 S.Ct. 1880; 68 L.Ed.2d 378 (1981), the Court was Clear and unequivocal in affirming this right:

"In *Miranda* v. *Arizona*, *supra*, the Court determined that the Fifth and Fourteenth Amendments' prohibition against compelled self-incrimination required that custodial interrogation be preceded by advice to the putative defendant that he has the right to remain silent and also the right to the presence of an attorney. *Id.*, 384 U.S., at 479. The Court also indicated the procedures to be followed subsequent to the warnings. If the accused indicates that he wishes to remain silent, 'the interrogation must cease.' If he requests counsel, 'the interrogation must cease until an attorney is present.' 384 U.S., at 474.

"Miranda thus declared that an accused has a Fifth and Fourteenth Amendment right to have counsel present during custodial interrogation."

general investigation.[19] Finally, there is little question that when interrogated after arraignment, the 6th Amendment guaranteed Jackson the right to the presence of counsel.[20] The

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[19] In *Escobedo* v. *Illinois*, 378 U.S. 478; 84 S.Ct. 1758; 12 L.Ed.2d 977 (1964), a police investigation of murder had focused on Danny Escobedo. Escobedo, like Respondent Jackson "had become the accused, and the purpose of the interrogation was to 'get him' to confess despite his constitutional right not to do so." Id., 485. The police took Escobedo into custody for interrogation and refused to honor his request for counsel at the interrogation. Justice Goldberg, writing for the majority, stated:

"What happened at this interrogation could certainly 'affect the whole trial,' since rights 'may be as irretrievably lost, if not then and there asserted, as they are when an accused represented by counsel waives a right for strategic purposes.' It would exalt form over substance to make the right to counsel, under these circumstances, depend on whether at the time of the interrogation, the authorities had secured a formal indictment. Petitioner had, for all practical purposes, already been charged with murder." [citations omitted] 378 U.S., at 486.

[20] In their opinion below, *People* v. *Bladel*, 421 Mich. 39, 51-52; 365 N.W.2d 56 (1984), the Michigan Supreme Court succinctly recounted the authorities establishing this right:

"The Sixth Amendment guarantees that '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.' However, this right to counsel attaches only at or after the initiation of adversary judicial proceedings against the accused by way of a formal charge, preliminary hearing, indictment, information, or arraignment. *United States* v. *Gouveia*, ____ U.S. ____, ____; 104 S.Ct. 2292; 81 L.ED.2d 146, 153-154 (1984); *Kirby* [v. *Illinois*, 406 U.S. 682; 92 S.Ct. 1877; 32 L.Ed.2d 411 (1972)], *supra*, 406 U.S. 688-689. The accused is entitled to counsel not only at trial, but at all 'critical stages' of the prosecution, i.e., those stages 'where counsel's absence might derogate from the accused's right to a fair trial.' *United States* v. *Wade*, 388 U.S. 218, 226-227; 87 S.Ct. 1926; 18 L.Ed.2d 1149 (1967). Regardless of whether the accused is in custody or subjected to formal interrogation, the Sixth Amendment right to counsel exists whenever the police attempt to elicit incriminating statements. *Henry [United States* v. 447 U.S. 264; 100 S.Ct. 2183; 65 L.Ed.2d 115 (1980)], *supra*, 447 U.S. 271-273. See also *Brewer* v.

serious questions in this case are whether Respondent Jackson waived these rights.

C. Waiver Of Constitutional Right To Counsel Generally.

In 1938, the Supreme Court adopted a general definition of waiver in a case involving the constitutional right to counsel. *Johnson* v. *Zerbst*, 304 U.S. 458, 464; 58 S.Ct. 1019; 82 L.Ed. 1461 (1938):[21]

> "It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.' *A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.* The determination of whether there has been an intelligent waiver of the right to Counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." (footnotes omitted, emphasis added).

Application of this waiver standard is not always a simple matter. In *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 243-244; 93 S.Ct. 2041; 36 L.Ed.2d 854 (1973), Justice Stewart wrote:

> "To be true to *Johnson* and is progeny, there must be examination into the knowing and understanding nature of the waiver, an examination that was designed for a trial judge in the structured atmosphere of a courtroom. As the Court expressed it in *Johnson:*

Williams, 430 U.S. 387; 97 S.Ct. 1232; 51 L.Ed.2d 424 (1977); *Massiah* v. *United States*, 377 U.S. 201; 84 S.Ct. 1199; 12 L.Ed.2d 246 (1964)."

[21] This same standard is now applied where the right to counsel is quaranteed by the 5th *or* 6th Amendments. *Edwards* v. *Arizona*, 451 U.S. 477, 482; 101 S.Ct. 1880; 68 L.Ed.2d 378 (1981). See *Faretta* v. *California*, 422 U.S. 806, 835; 95 S.Ct. 2525; 45 L.Ed.2d 562 (1975); *North Carolina* v. *Butler*, 441 U.S. 369, 374-375; 99 S.Ct. 1755; 60 L.Ed.2d 286 (1979); *Brewer* v. *Williams*, *430 U.S. 387, 404; 97 S.Ct. 1232; 51 L.Ed.2d 424 (1977)*; *Fare* v. *Michael C.*, 442 U.S. 707, 724-725; 99 S.Ct. 2560; 61 L.Ed.2d 197 (1979).

> 'The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.' 304 U.S, at 465."[22]

It is apparent that the Court has not felt compelled to remain "true" to *Johnson* and its progeny in cases involving in-custody *pre*-arraignment interrogation. Although adhering to the *Johnson* definition, the police are generally entrusted to determine waiver in the first instance and courts try to reconstruct whether the waiver was intelligent under the totality of the circumstances. *Solem* v. *Stumes*, ___ U.S. ___; 104 S.Ct. 1338; 79 L.Ed.2d 579, 589-590 (1984); *North Carolina* v. *Butler*, 441 U.S. 369, 374-375; 99 S.Ct. 1755; 60 L.Ed.2d 286 (1979). The in-court examination of the accused has been required where an accused seeks to waive counsel at trial, *Faretta* v.

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[22] The Court was even more explicit in *Von Moltke* v. *Gillies*, 332 U.S. 708, 723-724; 68 S.Ct. 316; 92 L.Ed. 309 (1948):

> "To discharge this duty [of assuring the intelligent nature of the waiver] properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. *The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility.* To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered." (emphasis added).

California, 422 U.S. 806; 95 S.Ct. 2525; 45 L.Ed.2d 562 (1975). Courts may be reluctant to make such procedure a requirement for pre-arraignment interrogation presumably because of the practical difficulties which might frustrate police and because interrogation at the pre-arraignment stage is frequently investigatory rather than solely accusatory. Cf. *Schneckloth* v. *Bustamonte*, *supra*, at 245. Once formal criminal proceedings have begun, however, the police interrogate the accused presumably to bolster the State's case and the accused must be brought before a magistrate for arraignment anyway. The circumstances have changed and the more careful judicial examination is both fair and practical.

D. The Prosecution's Burden To Prove A Post-Arraignment Waiver Of Counsel During Police Interrogation Is Substantially Greater Than A Pre-Arraignment Waiver Because An Understanding Waiver At This Stage Is Extremely Unlikely.

It is fundamentally unfair to hold that a precious right is waived under circumstances where an individual is unlikely to have understood the importance of that right. See e.g., fn. 22 (*VonMoltke* v. *Gillies*). There is not one lawyer in this country who would have the temerity to say that an accused should talk to the police without counsel to advise him.[23] The plain likelihood is that the accused has little or no comprehension of what

[23] Consider, for example, a child of 10 who seeks to "waive" the apparent drugery of public school. Few would disagree that the child cannot waive the precious right to education. Yet when the child reaches age 16 or achieves 8th grade, an understanding "waiver" may be made. On the other hand, if a patient had a right to a heart transplant, there is probably no age at which such a right could be intelligently waived *or* invoked without examination by a heart surgeon and a thorough discussion with the patient. And yet, where the constitution provides a right which every legal expert would summarily invoke for a client without examination, how can courts be willing to assume an "understanding" waiver on the basis of police testimony that they advised the accused pursuant to *Miranda?*

he is doing if he waives the right to counsel after the State has already formally charged him with a felony.[24] Why then should courts be easily persuaded that counsel may be waived so long as police inform the accused, pursuant to Miranda, that he/she has a right to counsel?

In Robert Jackson's case, the police initiated the interrogation session which followed Jackson's request for counsel at arraignment. The Michigan Court of Appeals attempted to distinguish the *Edwards* case from the case at bar because Jackson requested counsel at his arraignment rather than during an interrogation session. *People* v. *Jackson*, 114 Mich. App. 649, 658-659 (1982). The Michigan Court of Appeals quoted from *Blasingame* v. *Estelle*, 604 F.2d 893, 895-896 (CA. 5, 1979) [a pre-*Edwards* case]:

> "[S]ome defendants may well wish to have an attorney to represent them in legal proceedings, yet wish to assist the investigation by talking to an investigating officer without an attorney present. 'While the suspect has an absolute right to terminate stationhouse interrogation, he also has the prerogative to then and there answer questions, if that be his choice.' *Nash* [v. *Estelle*, 597 F.2d 513, 517 (CA. 5, 1979)]. To hold that a request for appointment of an attorney at arraignment would bar an investigating officer from later finding out if defendant wishes to exercise this

[24] As Judge Knapp pointed out in *United States* v. *Satterfield*, 417 F.Supp. 293, 296 (SD. NY.), aff'd., 558 F.2d 655 (CA. 2, 1976):

> "Prior to indictment—before the prosecution has taken shape—there may be reasons why a suspect might rationally wish to deal with agents without the intervention of counsel. By getting in their good graces and being useful to the government he might be able altogether to avoid indictment or any legal entaglement. No such opportunity is open to him after a grand jury has spoken. At that point he cannot make any arrangement with agents or prosecutor that is not subject to ultimate approval by the court, and counsel is obviously important to advise him on what terms such approval is likely to be forthcoming and how best to obtain it."

See also, *United States* v. *Clements*, 713 F.2d 1030, 1034 (CA. 4, 1983).

prerogative would transform the *Miranda* safeguards, among which is the right to obtain appointed counsel, 'into wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests.' *Michigan* v. *Mosley*, 423 U.S. 96, 102; 96 S.Ct. 321, 326; 41 L.Ed.2d 313 (1975)."

The suggestion that appointed counsel is an "irrational obstacle" and will "deprive suspects of an opportunity to make informed and intelligent assessments" totally ignores the fact that after arraignment, police interrogation has become a prosecutorial activity designed to convict not to exculpate. Ironically, the Livonia Police also described counsel's role as an irrational obstacle when they advised "the only way you have any hope is by us . . . the attorney doesn't go to jail, does he?" (J.A. 157-158). It is ludicrous to suggest that Robert Jackson, or any other person formally charged with first-degree murder, requests counsel at arraignment solely because he wants help in the courthouse but not in the stationhouse.

Logically, it cannot be disputed that the right to counsel becomes more important after the State has formally decided to charge an accused with a serious crime. Since the circumstances the accused finds himself in are always more accusatory after arraignment than before, the burden on the prosecution must increase. Those authorities holding that a greater burden exists vary as to what extend the burden increases.[25] However,

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[25] See *United States* v. *Mohabir*, 624 F.2d 1140 (CA. 2, 1980) [judicial officer must explain content and significance of right to counsel]; *United States* v. *Clements*, 713 F.2d 1030 (CA. 4, 1983) [mere *Miranda* advice insufficient, accused must at a minimum also be informed of indictment]; *State* v. *Wyer*, 320 S.E.2d 92 (W.Va, 1984) [defendant must execute a written waiver after being informed of his arrest, the nature of the charges against him, and his *Miranda rights] People* v. *Bladel and Jackson*, 421 Mich. 39, 65-66; 365 N.W.2d 56 (1984) [at a minimum, *Edwards*-type rule applies]; *United States* v. *Durham*, 475 F.2d 208, 210-211 (CA. 7, 1973) [Chief Judge Swygert would adopt per se exclusionary rule].

in any case an understanding waiver of the precious right to counsel for post-arraignment interrogation should require more than mere *Miranda* advice.

E. Where Respondent Jackson Gave Seemingly Inconsistent Responses To Questions Whether He Wanted Counsel At Post-Arraignment Police Interrogation, There Was Not An Effective Waiver Of His Fifth Amendment Right To Counsel Under The Totality Of The Circumstances.

Robert Jackson testified that he asked for counsel at the start of the first pre-arraignment interrogation session in the Livonia Police Station on July 31st, 1979. He testified that when later asked whether he wanted an attorney, pursuant to the incantations required by *Miranda* v. *Arizona*, *supra*, he declined because the Livonia Police had explained that an attorney would not help, rather, only his personal cooperation could lead to a possible deal. (WHT 444-445). Jackson's testimony was strongly corroborated by a tape recording of similar outrageous police tactics during the interrogation of codefendant Michael White. See Part A, *supra*. The Livonia Police denied all improper conduct. The trial judge decided only that Jackson had not requested counsel. (J.A. 22).

It was undisputed, however, that Jackson requested the appointment of counsel when he was arraigned in District Court on August 1, 1979, and the police knew it. (J.A. 168; WHT 130). On the day after he had been arraigned and returned to the Livonia Jail, Jackson was again interrogated. Sgt. Ericson testified they wanted another taped statement from Jackson because he learned "that Bobby Jackson had now changed his statement." (J.A. 4). Sgt. Hoff began the post-arraignment interrogation by reminding Respondent that he had waived his rights in the past. There was no discussion or recognition of his recent request for counsel. As far as the record shows, there was nothing done beyond advising of *Miranda* rights. (J.A. 31-33).

All of the courts below held that Respondent Jackson either did not invoke his 5th Amendment right to counsel or knowing-

ly and voluntarily waived the right to counsel by failing to request counsel when advised by police pursuant to *Miranda*, *supra*. See *People* v. *Bladel*, *supra*, at 53. However, the lower courts failed to consider that Jackson's unequivocal request for counsel at arraignment should be construed as at least an ambiguous request for the presence of counsel at interrogation.

In *Smith* v. *Illinois*, 469 U.S. ____; 105 S.Ct. 490; 83 L.Ed.2d 488 (1984), the Court considered a case where the accused was being questioned by police shortly after arrest but before arraignment. He first stated that he wanted counsel present and then promptly agreed to talk to police alone. The Court held that since the accused first request was unequivocal police should not have continued questioning him. The Court in *Smith*, *supra*, at ____; 83 L.Ed.2d, at 494 noted an issue which was unnecessary to reach:

> "On occasion, an accused's asserted request for counsel may be ambiguous or equivocal. As the majority and dissenting opinions below noted, courts have developed conflicting standards for determining the consequences of such ambiguities.[3] We need not resolve this conflict in the instant case, ..." (citations omitted).

[3]Some courts have held that all questioning must cease upon any request for or reference to counsel, however equivocal or ambiguous. See, e.g., *People* v. *Superior Court*, 15 Cal.3d 729, 735-736, 542 P.2d 1390, 1394-1395 (1975), cert denied, 429 U.S. 816, 50 L.Ed.2d 76, 97 S.Ct. 58 (1976); *Ochoa* v. *State*, 573 S.W.2d 796, 800-801 (Tex. Crim. App. 1978). Others have attempted to define a threshold standard of clarity for such requests, and have held that requests falling below this threshold do not trigger the right to counsel. See, e.g., *People* v. *Krueger*, 82 Ill.2d 305, 311, 412 N.E.2d 537, 540 (1980) ('[A]n assertion of the right to counsel need not be explicit, unequivocal, or made with unmistakable clarity,' but not 'every reference to an attorney, no matter how vague, indecisive or ambiguous, should constitute an invocation of the right to counsel'), cert denied, 451 U.S. 1019, 69 L.Ed.2d 390, 101 S.Ct. 3009 (1981). Still others have adopted a third approach, holding that when an accused makes an equivocal statement that 'arguably' can be construed as a request for counsel, all interrogation must immediately cease except

> for narrow questions designed to 'clarify' the earlier statement and the accused's desires respecting counsel. See, e.g., *Thompson* v. *Wainwright*, 601 F.2d 768, 771-772 (CA. 5, 1979); *State* v. *Moulds*, 105 Idaho 880, 888, 673 P.2d 1074, 1082 (App. 1983).

Under any of the above noted standards, the post-arraignment interrogation of Robert Jackson violated his 5th Amendment right to counsel. It was clear that Jackson recognized he needed counsel to help him in the courts and with his expected adversary, the prosecutor. It should have been assumed that his direct request for help with formal proceedings was no less a request for help against equally expert adversaries, the police, at a stage which counsel would have instantly recognized as the most critical stage of all. The Livonia Police never discussed Respondent's request for counsel. At the very least, some steps should have been taken beyond *Miranda* advice to insure a knowing (understanding) waiver.

F. The Police Interrogation Practices In Robert Jackson's Case Demonstrate That An Accused's Post-Arraignment Constitutional Rights Should Be Protected By A Prophylactic Rule.

This Court should hold that a post-arraignment waiver of counsel is not valid unless done after consultation with counsel or after proper judicial inquiry pursuant to *Faretta* v. *California*, 422 U.S. 806; 95 S.Ct. 2525; 45 L.Ed.2d 562 (1975). It is unrealistic to think that zealous police officers "engaged in the often competitive enterprise of ferreting out crime,"[26] will

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[26] The need for preemptive judicial intervention to guarantee effective constitutional rights was recognized by Justice Jackson in *Johnson* v. *United States*, 333 U.S. 10, 13-14; 68 S.Ct. 367; 92 L.Ed. 436 (1948).

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption

fairly inform an accused of the value of his constitutional rights to counsel after the State has formally charged him with a serious crime. What occurs in the "conference" rooms of police stations rarely comes to light in the courtrooms of our criminal justice system. Police are under intense pressure to solve the burgeoning "problem" of crime which has perplexed the leaders of our country for decades. The news media daily bombard us with the horrors of crimes, many of which go unsolved. Yet, our government, without effectively attacking the roots of crime, asks the police to operate with inadequate resources and salaries. Well-meaning police, even some judges under such pressures dissemble, embellish and, sometimes, lie to ensure conviction of an accused they believed to be guilty of a serious crime.

It is important to remember that this case involves post-arraignment[27] interrogation. "Only in an atypical case . . .

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that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." (Footnotes omitted.)

[27] In *Kirby* v. *Illinois*, 406 U.S. 682, 689; 92 S.Ct. 1877; 32 L.Ed.2d 411 (1972), Justice Stewart wrote:

"The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law."

does police interrogation occur after judicial proceedings are initiated." Grano, *Rhode Island* v. *Innis: A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions*, 17 Amer. Crim. L.R. 1, 15 (1979). However, when post-arraignment interrogation does occur, it must be assumed that the police are seeking to strengthen the State's case for trial. Professor Kamisar fairly stated the circumstances as follows:

"Some people find it helpful to say that at this point there is a 'declaration of war' between the government and the defendant. The adverse positions of the government and the defendant have 'solidified.' The parties, as the Chief Justice put it in *Henry*, are now 'arms length adversaries.' 447 U.S., at 275. At this point, hopefully, the government has built its case. But if it has not, it cannot expect to elicit any more information from the defendant. It is too late. From this point on, the defendant is entitled to counsel and the agents of government may proceed against him only through his counsel." Kamisar, *Police Interrogation and Confessions* in Choper, Kamisar and Tribe, The Supreme Court: Trends and Developments, 1979-80, at p. 98 (1981).

It is unrealistic, indeed, fundamentally unfair to permit police interrogation to continue after arraignment with the accused's only protection being a pretrial hearing where the police are pitted against the accused in a swearing contest. The rich have an effective protection, an attorney who will come at their calling to advise them whether to speak. Unless the right to counsel is effectively guaranteed at arraignment by a prophylactic rule, the poor must rely on *Miranda* advice given by the police. The interrogation of Michael White graphically demonstrates the "*Miranda* advice" is hardly worth the paper its printed on when the formal reading of rights is followed by "police advice" such as that given by Sgt. Garrison and Sgt. Hoff:

"Now I think you need a brick to hit you against a wall to realize that your in serious trouble here and that *the only way that you have any hope is by us*. I don't know what your gonna think, now if you want an attorney, I'll tell you

what an attorney is gonna tell ya, an attorney is gonna tell ya don't talk to police. I can tell you that right now. Don't talk to the police. But, *the attorney doesn't go to jail, does he?*

"You know what the attorney does when you say that, the attorney knows that that's going to get a trial, even if he's appointed he gets paid by how much trial days." (J.A. 157-158).[28]

Truth is a frequent casualty under the present system. Police notes were the only record of the first interrogation sessions of Robert Jackson beginning when he was first arrested by Detroit Police. It can be fairly stated that abuse of authority thrives on discretion. Must we take the word of police that Jackson knowingly and intelligently waived his rights to counsel? Must we take the word of the police when they assert they made no threats and inducements to obtain a waiver and ultimately a confession? The real interrogation process would have remained unknown but for the tape recording of the interrogation of Michael White. In truth, Respondent Jackson was likely to have waived his rights only when he was convinced that "cooperation" was his "only hope."

The accuracy of alleged statements also suffers under police control. Where judges and juries must rely on the notes and memories of police officers, key evidence bearing on such difficult issues as the difference between manslaughter and murder

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[28] It is interesting to compare the techniques used in Respondent's case with those described in the police interrogation manuals quoted in *Miranda*, *supra*. For example, in Inbau & Reid, Criminal Interrogation and Confessions (1962), at 111, cited at 384 U.S. 454, the authors suggested the following advice regarding the right to silence:

"Joe you have a right to remain silent. That's your privilege and I'm the last person in the world who'll try to take it away from you. If that's the way you want to leave this, O.K. But let me ask you this. Suppose you were in my shoes and I were in yours and you called me in to ask me about this and I told you, 'I don't want to answer any of your questions.' You'd think I had something to hide and you'd probably be right in thinking that. That's exactly what I'll have to think about you, and so will everybody else. So let's sit here and talk this whole thing over."

or between aiding and mere presence often takes a decided shift toward the inculpatory. This is hardly surprising when the accused's statement with few exceptions, is elicited in the spirit of "nailing" the accused on the highest charge and later related to the fact-finder in a feigned spirit of impartiality with all professional skill and "police-speak" detectives of more the 20 years can muster. See fn. 13, *supra*. In Jackson's case where tapes of his statements were eventually made, the likelihood of inaccuracy of the statement itself is admittedly reduced. But even here, the critical first dialogue bearing on the waiver of rights is missing.

A rule allowing post-arraignment waiver of the right to counsel after examination by a neutral magistrate or with counsel's advice[29] would be consistent with this Court's prior decisions. This Court has recognized that the right to counsel at this stage is clearly precious. See Part B, *supra*. Traditionally, waiver of the right to counsel has been a matter for a neutral judicial officer. See Part C, *supra*. Practically, a prophylactic rule would advance our criminal justice system. First unlike eyewitness identification, police reliance on confessions at the post-arraignment stage is *un*healthy and *un*necessary.[30]

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[29] New York has established a rule requiring the cessation of any post-arraignment questioning unless an attorney is present and counsels the accused at the time of waiver. *People* v. *Cunningham*, 424 NYS 2d 421, 424; 49 N.Y.2d 203; 400 N.E.2d 360 (1980). Michigan has already recognized the efficacy of appointing counsel at the pre-indictment stage. Although an equally divided United States Supreme Court declined to take such a step, *Kirby* v. *Illinois*, *supra*, the Michigan Supreme Court, without dissent, held that an accused is Constitutionally entitled to counsel at pre-indictment identification procedures. *People* v. *Anderson*, 389 Mich. 155, 171-172, 186-187; 205 N.W.2d 461 (1973). As a result of this decision Wayne County, at least, has instituted a practice of having an appointed lineup counsel on call in the event the police choose to assemble a lineup for identification of an in-custody accused.

[30] In *Escobedo* v. *Illinois*, *supra*, 378 U.S., at 488-489, Justice

Second, hundreds of years of judicial history suggest that confessions are far less reliable than juries will believe.[31] Finally, lack of guidelines for police interrogation procedures breeds extensive litigation and disrespect for law. The police themselves may be victims as they are pressured to justify the violation of established Court rules to induce a confession and later are tempted to perjure themselves to validate the confession. The accused and others involved in these matters who witness such police misconduct find it difficult to support the criminal justice system in such an atmosphere of deceit. And

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Goldberg wrote:

> "We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation.
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> * * *
>
> "This Court also has recognized that history amply shows that confessions have often been extorted to save law enforcement officials the trouble and effort of obtaining valid and independent evidence. . . . *Haynes* v. *Washington*, 373 U.S. 503, 519; 83 S.Ct. 1336; 10 L.Ed.2d 513.
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> "We have also learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have *fear* that if an accused is permitted to consult with a lawyer, he will become aware of and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system." (footnotes omitted).

[31] Confessions have traditionally been excluded as unreliable if "extracted by any sort of threats or violence, [or] obtained by direct or implied promises, however slight, [or] by the exertion of any improper influence". *Bram* v. *United States*, 168 U.S. 532, 542-543; 18 S.Ct. 183; 42 L.Ed. 568 (1897). See also, the historical analysis in *Bram*, at 542-561. Scientific analysis also indicates that confessions, even where obtained voluntarily, are less reliable than a lay jury would assume. Kassin, S.M. & Wrightsman, LS., Coerced Confessions, Judicial Instruction, and Mock Juror Verdicts, *Journal of Applied Social Psychology*, 1981, 11, 6, pp. 489-506.

Practically speaking, when Robert Jackson exercised his right to counsel at arraignment, it is likely that his appreciation of the value of counsel differed very little from when the Livonia Police advised him. The magistrate at arraignment did not expound on counsel's value, he simply noted that Jackson had petitioned for counsel. The reasonable conclusion to be drawn is *not* that Robert Jackson was exercising a mere formality.[33] Jackson, as he had from the time of his arrest, was seeking every opportunity to preserve his freedom. When dependent upon police advice, the right to counsel, like the right to remain silent, was flim-flammed away as an obstacle to a deal. But when formally offered without the strings attached by police, the right to counsel was quite naturally embraced.

Robert Jackson's formal request for counsel at arraignment was a request for the assistance of counsel against the "prosecutorial forces of organized society" in all forums and forms where the State would seek to incriminate and convict. The State should not be permitted to circumvent this unequivocal request in open court by merely extending the same station-house *Miranda* advice which the Livonia Police could so neatly explain away in subsequent discussions about what these rights "really mean" to the defendant. The Livonia police should not be the ones[34] who say whether Respondent Jackson waived a right asked for and given in open court, which they think stands between them and wrapping up a conviction. Under any recognized standard, the prosecution cannot establish a valid waiver of Robert Jackson's right to counsel. Jack-

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[33] As was stated by Mr. Justice White, concurring in *Michigan* v. *Mosley*, 423 U.S. 96, 110; 96 S.Ct. 321; 46 L.Ed.2d 313 (1975): "[T]he accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities insistence to make a statement without counsel's presence may properly be viewed with skepticism."

[34] "Sed quis custodiet ipsos Custodes? (But who is to guard the guards themselves?) Decimus Junius Juvenal. c. 50-130 A.D., Barlett, Jr.. *Familiar Quotations*, p. 139.

son's post-arraignment confession must be suppressed and the judgment of the Michigan Supreme Court affirmed.

CONCLUSION AND RELIEF

Once adversary proceedings have formally begun, custodial police interrogation is presumptively accusatory rather than investigatory. Police, as agents of the prosecutorial forces of the State, should not be engaged in attempting to advise an accused whether to waive precious constitutional rights which virtually no lawyer would advise be waived. This Court should hold that the right to counsel is not valid unless made pursuant to judicial examination or in the presence and with the advice of counsel.

WHEREFORE, for the reasons stated in Respondent's Brief, Respondent respectfully requests that this Honorable Court dismiss the Petition for Writ of Certiorari as improvidently granted or, in the alternative, affirm the judgment of the Michigan Supreme Court.

Respectfully submitted,

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